United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-1036

On Submission

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1036

VINCENT RIZZO,

Appellant,

—v.—

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Vincent Rizzo appeals from an Order entered on December 30, 1976, in the United States District Court for the Southern District of New York by the Honorable Frederick van Pelt Bryan, United States District Judge, denying, after a hearing, Rizzo's motion pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure, to withdraw his guilty plea.

Indictment 73 Cr. 672, filed in eight counts on July 10, 1973, named Vincent Rizzo and fifteen others as defendants. Count One charged Rizzo and his co-defendants with a conspiracy in violation of Title 18, U.S.C. § 371, which included as its aims the transportation in interstate and foreign commerce of stolen and counterfeited securities; the unlawful possession of articles stolen from the mails; the conduct of an enterprise which fenced

these stolen and counterfeit securities through a pattern of racketeering activity; the use of extortionate means to collect an extension of credit from Alfred Barg and Winfried Ense; and travel and use of the telephone in interstate and foreign commerce in order to promote extortions, in violation of 18 United States Code, Sections 2314, 1708, 1962, 894 and 1952 respectively. Counts Two through Five charged Rizzo and various co-defendants with the knowing transportation of stolen Treasury Bills in interstate and foreign commerce, in violation of 18 U.S.C., §§ 2314 and 2. Count Six charged a co-defendant with the interstate transportation of stolen securities, also in violation of 18 U.S.C. § 2314. Count Seven charged Rizzo and a co-defendant with extortion in violation of 18 U.S.C. §§ 894 and 2. Count Eight charged Rizzo and a co-defendant with travel in, and use of the telephone and the mail in, interstate and foreign commerce in order to promote the unlawful activity of extortion and with performing acts thereafter for that purpose, in violation of 18 U.S.C. §§ 1952 and 2.

On October 9, 1973, Rizzo withdrew his previously entered pleas of not guilty and entered a plea of guilty before the Honorable Lloyd F. MacMahon, to whom the case was assigned for trial, to Counts One and Eight.*

On December 6, 1973, Rizzo was sentenced by Judge Frederick van Pelt Bryan on this Indictment to a five

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* Six of Rizzo's co-defendants, William Benjamin, Louis Gittleman, Jerry Marc Jacobs, Manuel Richard Jacobs, Domenick Mantell, and Peter Raia, pled guilty to Count One of the indictment. Six others, Tommaso Amato, Remegio Begni, Mario Foligni, Leopold Ledl, Marina Neubert and Ernest Shinwell, were foreign nationals who were unextraditable and thus were and remain fugitives. Of the remaining defendants, an order of nolle prosequi was entered as to Evelyn Jacobs and Patty Marino and Hyman Grant also remain fugitives.

year prison term on each of Counts One and Eight to run concurrently with each other, execution of each sentence suspended.* Counts Two through Seven were dismissed on Rizzo's motion and with the consent of the Government at the time of sentence.**

On July 30, 1976, Rizzo moved, pursuant to 28 U.S.C. § 2255, to vacate his conviction and sentence, on the grounds that he was not personally present when Judge Bryan amended his suspended sentences to include the terms of probation. On December 21, 1976, Judge Bryan granted Rizzo's motion to vacate the sentence but refused to vacate the conviction and advised Rizzo that he would personally resentence him on the Indictment. Before Judge Bryan resentenced him, however, Rizzo made a motion to withdraw his guilty plea pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure. On December 29, 1976 Judge Bryan denied the motion after

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* On this date Judge Bryan also sentenced Rizzo on Indictments 72 Cr. 1333 and 72 Cr. 1332, which were pending before Judge Duffy and himself, respectively. Rizzo had requested after entering pleas of guilty to certain counts of the three Indictments that for sentencing all three cases be referred to one Judge. The three cases were thereafter transferred to Judge Bryan for sentencing. Rizzo received a five year suspended sentence on Indictment 72 Cr. 1332. On Indictment 72 Cr. 1333 he received a twenty year prison term to run concurrently with previous sentences imposed by Judge Gagliardi on Indictment 73 Cr. 195 and by Judge Carter on Indictment 72 Cr. 1330.

** The docket entries indicate that on December 14, 1973, Judge Bryan filed a corrected judgment that supplemented the concurrent suspended sentences with a term of probation of one day, and that on January 8, 1974 a second corrected judgment was also filed to the same effect.

Although Rizzo's motion papers are notarized July 30, 1976, the mail room stamp for the United States Attorney's office indictates that they were not received until sometime in October of 1976, and there is no indication that this motion was ever filed in the Clerk's office of the District Court.

finding that there was a factual basis for the plea. Judge Bryan then resentenced Rizzo to two concurrent five year terms, execution of sentence suspended, and placed him on probation for a period of one day. On January 4, 1977, Judge Bryan filed a written order to the same effect.

Statement of Facts

On October 9, 1973, Rizzo accompanied by his attorney, Gilbert Epstein, Esq., appeared before Judge MacMahon. Mr. Epstein informed the District Court that Rizzo wished to withdraw his previously entered plea of not guilty and wished to plead guilty to the first and third counts of the Indictment. He also informed the Court that he had advised Rizzo of his rights and had also read to him, on two separate occasions, the full text of each of the Counts (Tr. 1).* Mr. Epstein also stated his opinion that Rizzo was fully familiar with the charges and the penalties involved.

The District Court then asked Rizzo what he was charged with in Count One and if he understood what he was charged with. Rizzo responded. "Conspiracy." After several further questions the Court asked, "Conspiracy to do what?" Rizzo answered, "Of knowingly knowing about stolen securities, dealing in stolen securities." (Tr. 2-3).

Still unsatisfied, Judge MacMahon then isolated each of the objects in the conspiracy charge for the appellant

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* "Tr." refers to pages of the transcript of the plea proceedings held on October 9, 1973, included in the Government's appendix. "App." refers to the Government's appendix.

and further explored his understanding of the conspiracy charge against him.*

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*THE COURT: You are charged with, among other things, conspiracy to transport him [sic.] interstate and foreign commerce securities and money of a value of $5,000 or more knowing the same to have been stolen, converted, and taken by fraud.

Do you understand that that is what you are charged with?

DEFENDANT RIZZO: Yes, your Honor.

THE COURT: Further, you transported in interstate and foreign commerce falsely made forged altered counterfeited securities knowing that they were falsely made, forged, and counterfeited. Do you understand that?

DEFENDANT RIZZO: Yes.

THE COURT: That's what you are charged with. Have you read this indictment against you?

DEFENDANT RIZZO: I read it 20 times. I tried to see where I fit in.

THE COURT: You understand what you are charged with? That's all I am concerned with now.

DEFENDANT RIZZO: Yes.

THE COURT: Do you understand that there are four other charges in here? There are a number of other charges. You have in there possession of articles, things contained in packages, bags, and mail which had been stolen, taken, embezzled, and abstracted from the mail, knowing that they had been stolen, taken, and embezzled and abstracted. Do you understand that? That's what you are charged with.

DEFENDANT RIZZO: Yes, sir.

THE COURT: You are also charged with participating directly or indirectly in the conduct of an enterprise dealing with a fencing and illegal distribution of large quantities of stolen securities, through a pattern of racketeering activity. You are charged with that as well?

DEFENDANT RIZZO: Yes.

THE COURT: You are charged further that you and William Benjamin were participating in the use of extortion and means to collect, and attempt to collect, an extention of credit, to punish Alfred Barg and Winfried Ense for a nonpayment thereof.

Do you understand that?

[Footnote continued on following page]

After satisfying himself that Rizzo had a full understanding of the nature of the conspiracy charge, Judge MacMahon asked Rizzo if he had entered into an agreement with other people to do what was charged against him in the indictment. During a lengthy exchange covering several pages of printed transcript, (Tr. 5-9), the Court closely examined Rizzo on the specifics of his agreement with his co-conspirators. During this interchange, Rizzo related at length and with great detail his precise conversations and actions.

The Court then asked Rizzo if he realized that if he pleaded guilty he could be sentenced to five years in prison or fined $10,000.00 or both. The appellant answered, "Yes, your Honor.", and then entered his plea of guilty to Count One. (Tr. 9-10).

Judge MacMahon then explored the voluntariness of Rizzo's plea as follows:

> THE COURT: Has any promises been made that you will be treated leniently?
>
> DEFENDANT RIZZO: No, your Honor. None, whatsoever.
>
> THE COURT: Have any threats been made against you to induce you to plead guilty?
>
> DEFENDANT RIZZO: No.

DEFENDANT RIZZO: I understand that charge, your Honor.

THE COURT: Further, to use, knowingly travel and cause travel, and use, cause to be used, the telephone and mails in interstate and foreign commerce with intent to promote, to establish, to carry on, and facilitate the promotion, management, and establishment and carry out of an unlawful activity.

Do you understand that?

DEFENDANT RIZZO: Yes. (Tr. 3-4).

THE COURT: Have any threats been made against any member of your family?

DEFENDANT RIZZO: No, your Honor.

THE COURT: Has Mr. Epstein made any promises to you that you would be treated leniently?

DEFENDANT RIZZO: No.

THE COURT: Has Mr. Aronwald?

DEFENDANT RIZZO: No, your Honor.

THE COURT: Has Mr. Epstein made any promises to you that you would be treated leniently?

DEFENDANT RIZZO: No.

THE COURT: Has Mr. Aronwald?

DEFENDANT RIZZO: No, your Honor.

THE COURT: Has any FBI agent or any other Government agent made any promises that you would be treated leniently if you pleaded guilty?

DEFENDANT RIZZO: None whatsoever.

THE COURT: Are you pleading guilty to count one because you are guilty and for no other reason?

DEFENDANT RIZZO: For what I stated as to the facts and the true facts, I plead guilty.

THE COURT: You say you read these charges in count one. Are you guilty of them or not? That's what I want to know.

DEFENDANT RIZO: I am guilty of what I am charged with, your Honor. I wanted an opportunity to tell you my facts.

THE COURT: I want to know what you did, exactly what you did.

DEFENDANT RIZZO: Thank you, your Honor. (Tr. 10-11).

After accepting this plea to Count One, Rizzo, through his counsel, next offered to plead guilty to Count Three. (Tr. 11-12). After Judge MacMahon read the substance of this Count to him, however, Rizzo again, through his counsel, withdrew his offer to plead guilty to Count Three and offered to plead guilty to Count Eight of the Indictment.

The Court then read to Rizzo the charge against him in Count Eight and Rizzo entered a guilty plea. The Court then proceded to examine Rizzo at similar length, closely questioning Rizzo about the precise acts he had committed. In particular, when Rizzo at first denied having made any threats (Tr. 13-14), the prosecutor gave the following description of what would have been demonstrated at trial:

MR. ARONWALD: Your Honor, the government would prove if this case were to be tried that Mr. Rizzo went to Germany on two separate occasions and that upon the occasions threats were made to Mr. Ense and Mr. Barg by Mr. Rizzo they would suffer physical harm unless they paid the money that Mr. Rizzo claimed was owed to him.

In addition, as a result of that fear, Mr. Barg turned over to Mr. Rizzo, in writing, the rights to certain profits of the company owned and controlled by Mr. Barg in Europe.

In addition to that, one of Mr. Rizzo's trips, Mr. Rizzo made a telephone call call which was recorded pursuant to a Germany court order au-

thorizing the wire tapping of Mr. Rizzo's hotel phone in which he instructed Mr. Benjamin to call Mr. Ense and Mr. Barg and tell them that Mr. Rizzo was there to collect money, that the money he was collecting was for some bad people in New York, and that unless these two gentlemen in Germany paid that money that things could happen to them.

Your Honor, the government——

THE COURT: Did he use the language "bad things"? What is the evidence? What were the threats?

MR. ARONWALD: Just that Mr. Rizzo instructed Mr. Benjamin to tell Mr. Ense and Mr. Barg that Mr. Rizzo was merely a messenger boy and represented some very bad people in New York, and he had to come back to New York with $200,000 or there would be trouble.

THE COURT: Is what Mr. Aronwald said substantially true?

DEFENDANT RIZZO: Yes.

THE COURT: Did you do that knowing that it was wrong and you did it intentionally and on purpose?

DEFENDANT RIZZO: I told Mr. Benjamin to call up Mr. Ense and Mr. Barg and to explain to them that I am only an errand boy. I don't know about whether the stock was counterfeit or good. I wanted him to tell them my only purpose was to collect the money and for nothing else, that the pressure on me was terrible.

THE COURT: But you did?

DEFENDANT RIZZO: I did it. I told Mr. Benjamin to call them up and explain to them because maybe I was not getting through to them.

THE COURT: You knew what you were doing?

DEFENDANT RIZZO: Yes.

THE COURT: You were not acting under any mistake or negligence or carelessness?

DEFENDANT RIZZO: This was definite, your Honor.

THE COURT: You did it deliberately and intentionally?

DEFENDANT RIZZO: Yes, your Honor. (Tr. 14-16).

At this point Judge MacMahon thoroughly advised Rizzo of the rights he was relinquishing by pleading guilty to the two counts. (Tr. 16-17). The Court accepted Rizzo's plea to Count Eight, and advised Rizzo that he could be sentenced to up to ten years in prison and fined up to $20,000.00 or both on the two counts combined. (Tr. 18). Judge MacMahon then asked Rizzo a series of questions to determine his mental competency and to elicit his family and educational background. (Tr. 18-20). After Rizzo answered each of the Court's questions, the Court asked Mr. Epstein if he had fully discussed the case with Rizzo. Mr. Epstein replied that he had and he also stated that he had discussed the case with Mr. Aronwald, counsel for the Government, and reviewed the contents of the Government's case file. He further stated that in his opinion there was "sufficient evidence to send this case to a jury and sufficient evidence to warrant a jury returning a verdict as guilty." (Tr. 20).

In response to further questions from the Court Mr. Epstein also stated that he had discussed with Rizzo at length both the rights he was waiving and any possible defenses and that based on his knowledge of the case he knew of no defense available to Rizzo and no reason why he should not plead guilty to either Count One or Count Eight. (Tr. 20-21).

Judge MacMahon then addressed Rizzo personally as follows:

THE COURT: Have you discussed the case with Mr. Epstein?

DEFENDANT RIZZO: I told him the facts, your Honor, the complete facts, your Honor.

THE COURT: Has he answered any questions you had to your satisfaction?

DEFENDANT RIZZO: He answered all my questions.

THE COURT: He was, of course, appointed by the court to represent you.

DEFENDANT RIZZO: Yes, your Honor.

THE COURT: In all three cases pending against you in this court he was appointed to represent you; is that right?

DEFENDANT RIZZO: Yes, your Honor.

THE COURT: Are you satisfied with him?

DEFENDANT RIZZO: Yes, your Honor.

THE COURT: Did you understand your Constitutional Rights as I just gave them to you, what I just told you, your right to a trial by jury and a presumption of innocence?

DEFENDANT RIZZO: Yes.

THE COURT: Have you read the written acknowledgment of the advice about your Constitutional Rights?

DEFENDANT RIZZO: It was read to me by my lawyer.

THE COURT: You understand that?

DEFENDANT RIZZO: Yes, your Honor.

THE COURT: Is there anything you want to ask me about your rights?

DEFENDANT RIZZO: No, your Honor. I am leaving everything up to you.

THE COURT: Did you sign the written acknowledgment of the advice?

DEFENDANT RIZZO: On your request, yes, your Honor.

(The defendant complied.)

THE COURT: Has it been read to you?

DEFENDANT RIZZO: Yes.

THE COURT: Mr. Aronwald, do you represent that the government has sufficient evidence to convict Mr. Rizzo beyond a reasonable doubt of the charges made against him in Counts 1 and 8?

MR. ARONWALD: Yes, sir, I do. (Tr. 21-22).

The Court accepted the plea. (Tr. 23).

On December 21, 1976, Rizzo moved, pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure to withdraw his guilty plea. (App. 67). In support of his motion, Rizzo argued that the District Court accepted

his pleas of guilty without making a proper determination pursuant to Rule 11 of the Federal Rules of Criminal Procedure, that the plea was entered voluntarily, with an understanding of the nature of the charges, and upon a sufficient factual basis.

After reviewing the record and hearing argument, on December 29, 1976, Judge Bryan found that Rizzo's guilty plea was proper in all respects. (App. ....). On January 4, 1977 Judge Bryan denied Rizzo's motion in a written order. (App. ....).

ARGUMENT

The District Court Properly Denied Rizzo's Motion Under Rule 32(d) of the Federal Rules of Criminal Procedure.

Perhaps recognizing that his present claims do not allege facts sufficient to make a claim under 28 U.S.C. § 2255, since he does not claim or demonstrate a "miscarriage of justice," *Hill* v. *United States*, 368 U.S. 424, 429 (1962); *Davis* v. *United States*, 417 U.S. 333, 346 (1974), nor explain why he did not raise these claims on direct appeal or his guilty plea, *Seiller* v. *United States*, 544 F.2d 554, 561 n.9 (2d Cir. 1975); *United States* v. *Wright*, 524 F.2d 1100, 1102 (2d Cir. 1975), Rizzo has instead sought to withdraw his plea of guilty under Rule 32(d) of the Federal Rules of Criminal Procedure.*

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* A very recent decision in the United States Court of Appeals for the District of Columbia Circuit has opined that a Rule 32(d) motion is the most appropriate—and perhaps the exclusive—manner of attacking any guilty plea. *United States* v. *Watson*, 548 F.2d 1058 (D.C. Cir. 1977). To our knowledge, no other court has so ruled, and § 2255 attacks on guilty pleas have in fact been common in this and other circuits.

That rule provides the District Court with power to vacate a conviction and allow withdrawal of the guilty plea "to correct manifest injustice."* As this Court has noted, the trial judge to whom the motion is addressed has a wide range of discretion in deciding whether or not to grant the motion, and his determination in that regard will not be disturbed on appeal in the absence of a clear abuse of that discretion. *United States* v. *Moore*, 360 F.2d 146, 147 (2d Cir. 1966); *United States* v. *Lester*, 247 F.2d 496, 500 (2d Cir. 1957). Indeed, this discretion is inherent in the standard enunciated in the Rule and in the clear language that the Court "may" grant the

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* Since Rizzo successfully moved to be re-sentenced on this indictment on the ground that he was absent during the first sentence, and since his Rule 32(d) motion was made prior to *re*sentence, arguably the "manifest injustice" standard should not apply. Indeed, one court has so held under circumstances similar to those of this case. *Oksanen* v. *United States*, 362 F.2d 74, 78 (8th Cir. 1966). We submit, however, that since Rizzo does not—and, in view of the sentence he received, cannot—challenge the substantive validity of the sentence, the "manifest injustice" standard should nonetheless apply. Indeed, the "practical considerations important to the proper administration of justice" underlying the "manifest injustice standard," *Kadwell* v. *United States*, 315 F.2d 667, 670 (9th Cir. 1963), require nothing less. This is particularly true since due to Rizzo's decision to wait several years before making his motion, the Government is potentially unable to prosecute him for the offense to which he has pleaded guilty—a situation that one court has noted calls for the imposition for "exceptionally high standards" in reviewing a motion to withdraw a guilty plea. *United States* v. *Barker*, 514 F.2d 208, 222 (D.C. Cir. 1975) (en banc), *cert. denied*, 421 U.S. 1013 (1976); cf. *United States* v. *Lombardozzi*, 436 F.2d 878 (2d Cir.), *cert. denied*, 402 U.S. 908 (1971).

At any rate, even if the somewhat more lenient standard applicable to timely, pre-sentence motions were applied, it is clear that Rizzo's claim does meet that standard. *United States* v. *Michaelson*, Dkt. No. 76-1559, slip p. 2615, 2617-18 (2d Cir., March 31, 1977).

relief. Particularly in view of the suspended sentence that he received on this indictment, Rizzo's claims, taken as a whole, do not begin to make a sufficient showing that Judge Bryan abused his discretion. At any rate, as we shall now demonstrate, each of the component parts of Rizzo's claims in the District Court and on appeal are flatly refuted by the record.

A. The record establishes that Rizzo's plea was voluntary.

Rizzo argues that Judge MacMahon failed to determine whether he voluntarily pleaded guilty to Counts One and Eight. This claim is frivolous.

The record clearly establishes that Judge MacMahon inquired extensively into the voluntariness of Rizzo's plea to each count. With respect to Count One, he asked Rizzo if any threats had been made against him or any member of his family or if any promises of leniency were made to him to induce him to plead guilty. To each question Rizzo responded in the negative. The Court also specifically asked Rizzo, "Are you pleading guilty to Count one because you are guilty and for no other reason?" And Rizzo answered, "For what I stated as to the facts and the true facts, I plead guilty." (Tr. 10-11).

Further, prior to accepting his guilty plea to Count Eight the Court carefully advised Rizzo of the constitutional rights he was waiving by pleading guilty.* The

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* Rizzo does not complain that his plea was invalid on the grounds that he was not advised of his full range of constitutional rights, nor can he. The advice of rights given by Judge MacMahon was so thorough that it satisfied the standards enunciated in the current version of Rule 11 although he gave them prior to its effective date of December 1, 1975. Indeed, the only factor

[Footnote continued on following page]

Court also inquired of Rizzo whether he was satisfied with his lawyer, to which he responded, "Yes." When the Court then inquired if Rizzo had any questions about his rights to ask the Court he responded, "No." (Tr. 21-22).*

Further, after accepting Rizzo's plea to Count Eight the Court advised Rizzo of the possible consequences of his pleas and again asked him if he were still willing to plead guilty to the two counts. Rizzo answered, "Yes, your Honor." And finally the Court asked, "You are pleading to count one and to count 8 because you are guilty and for not other reason?" And Rizzo responded, "Right, your honor." (Tr. 18).

The record here is more than sufficient to refute Rizzo's claim that his plea was not voluntary.

B. The record establishes that Rizzo understood the nature of the charges to which he pleaded guilty.

Rizzo contends that Judge MacMahon failed to determine whether he understood the charges to which he pleaded guilty. This claim is without merit.

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in the current version of the Rule that Judge MacMahon failed to anticipate was provision 11(c)(5) regarding the possible use of statements given by the defendant under oath about the offense to which he is pleading. This would not require the plea to be set aside even under the new Rule 11. *United States* v. *Journet*, 544 F.2d 633, 637 n.6 (2d Cir. 1976); *United States* v. *Michaelson*, Dkt. No. 76-1559, slip op. 2615, 2622-23 (March 31, 1977). In any event, it is clear that the plea would certainly stand with respect to the advice of rights for pre-Rule 11 amendment pleas under the standards for collateral review set forth in *Kloner* v. *United States*, 535 F.2d 730 (2d Cir. 1976).

* To the extent Rizzo alludes in his Statement of Facts to dissatisfaction with his counsel at the time of plea there is no support for this claim on the record.

First, the record is clear, that the conspiracy count to which Rizzo sought to enter his plea was twice read to him by his attorney (Tr.). That count charged that Rizzo and his specifically-named co-defendants, during a specified period of time, "unlawfully, wilfully and knowingly did combine, conspire, confederate and agree . . ." to violate the substantive provisions of 18 U.S.C. §§ 2314, 1708, 894, 1952 and 1962; and that certain specified overt acts were committed in furtherance of the conspiracy (App.).

Second, although the plea proceeding began with counsel for Rizzo advising the Court of the fact that he had twice read to Rizzo the full text of Counts One and Three,* Judge MacMahon did not rely on this alone but began the allocution by asking Rizzo if he knew what he was charged with in Count One. Rizzo responded that he was charged with "conspiracy" "Of knowingly knowing about stolen securities, dealing in stolen securities." (Tr. 2-3). Unsatisfied, Judge MacMahon continued to discuss the conspiracy charge with Rizzo by paraphrasing part by part each of the substantive violations charged as the objects of the conspiracy. As Judge MacMahon stated each of these specific violations encompassed in the conspiracy to Rizzo, he asked him if he understood that that was what he was charged with. In response to each question, Rizzo acknowledged to the Court that he understood the charge. (Tr. 3-4).

Third, before accepting Rizzo's plea to Count Eight the Court read the full text of that count to him. Count Eight charged that during a specific time Rizzo and his co-defendant William Benjamin travelled in, and used

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* Rizzo also personally advised the Court that he had read the indictment ". . . 20 times. I tried to see where I fit in." (Tr. 3).

the telephone and mail in, interstate and foreign commerce in order to promote the unlawful activity of extortion and with performing acts thereafter for that purpose.

Fourth, it was established that Rizzo had fully discussed Count One with his attorney and that he had told his attorney all of the facts relating to all of the charges. (Tr. 1-2, 20-21). Mr. Epstein also informed the Court that Rizzo was fully familiar with the charges, with the elements of the charges . . ." (Tr. 2).*

Finally, Judge MacMahon questioned Rizzo extensively about his educational background and his physical and mental state at the time of the plea. Rizzo indicated that he was not under the influence of any narcotic nor taking any kind of drugs, pills or medicines. He evidenced a full awareness of where he was and what he was doing. He also told the Court that he went through the third year of high school and had pursued an academic course. (Tr. 18-20).

From these facts, it is clear that this case is governed by the Court's decision in *Seiller* v. *United States*, 544 F.2d 554 (2d Cir. 1975). Indeed, the facts in *Seiller*, upon which the Court relied to reach its determination that the record sufficiently disclosed that the defendant understood the nature of the charges against him, *id.*

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* In *United States ex rel. Brock* v. *La Vallee*, 306 F. Supp. 159 (S.D.N.Y. 1969), a case where the court never personally questioned the defendant before acceptance of his plea, Judge Weinfeld stated, "Reliance by a court upon the advice given by counsel to an accused in the acceptance of a plea does not by itself taint it as one not understandingly or knowingly made. The matter is one of reality and not ritual. The essential question whether the plea was so made rests upon the reasonable inferences to be drawn from all the surrounding facts and circumstances." 306 F. Supp. at 163.

at 563, are indistinguishable in any material respect from the facts of this case.* Unlike the plea records in *Irizarry* v. *United States*, 508 F.2d 960 (2d Cir. 1975) and in *Rizzo* v. *United States*, 516 F.2d 789, 794 (2d Cir. 1976), the record here reveals that the precise contents and nature of each of the counts were carefully explained to Rizzo by both the Court and Rizzo's attorney. It follows that the District Court's conclusion that Rizzo fully understood and admitted all the elements of the charges against him was fully justified, and the record surely does not meet Rizzo's burden of demonstrating that the determination was "clearly erroneous." *United States* v. *Eucker*, 537 F.2d 718, 719 (2d Cir. 1976).

C. The record reveals a sufficient factual basis for the pleas.

Rizzo contends that the record fails to establish a sufficient factual basis for the District Court to have accepted his guilty pleas. This argument is without merit.

This Court stated the standard for determining whether there is a sufficient factual basis for a guilty plea under Rule 11 in *United States* v. *Irizarry*, 508 F.2d 960 (2d Cir 1975), as follows:

> "[P]articularly where more than one defendant is charged, a sufficient statement of the acts and intent of the particular defendant, what the defendant did and intended is necessary to an intel-

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* *Seiller* is instructive in another respect as well. As that opinion indicates, claims concerning invalidity of pleas made "only belatedly," 544 F.2d at 568, should be viewed with great circumspection. The fact that Rizzo waited several years before claiming that he did not in fact understand what he was doing at the time of his guilty plea itself demonstrates the hollow nature of his claim.

ligent determination of whether there was a factual basis for the plea." 508 F.2d at 968 n.9, quoting *United States* v. *Steele*, 413 F.2d 967, 969 (2d Cir. 1969).

Irizarry also made it clear that a reading of the indictment and obtaining the defendant's admission that he committed he acts charged therein may, in some cases, comport with the test laid down in *Steele*. *Id.* at 968, n 9. The Government need not rely solely on these two factors in this case however because Rizzo also made statements during the allocution that gave the District Court additional facts from which to conclude there was a sufficient factual basis for Rizzo's plea.

In pleading to the conspiracy count, Rizzo admitted he became involved in a deal which he later discovered involved stolen or counterfeit securities. He admitted unequivocally that although at the outset he was unaware that the deal involved stolen securities, after he learned of the stolen securities, he stayed in it in order to get "his money". He acknowledged that he went to Germany on or about February 26, 1972, in order to collect this money and while there he met with "Mr. Ense and Mr. Barg" and agreed to get them any stolen Treasury bills they wanted if they would give him his money. (Tr. 5-6; 8-9). At the conclusion of Rizzo's statement the Court specifically asked, "You say you read these charges in Count One. Are you guilty of them or not? That's what I want to know." Rizzo answered, "I am guilty of what I am charged with, your Honor. I wanted an opportunity to tell you my facts." (Tr. 11)

Rizzo's factual admissions coupled with his unqualified admission that he was guilty of the charges in Count One, (which he had read numerous times, his counsel had read to him twice and which the court had paraphrased for

him) gave Judge MacMahon ample justification in finding a factual basis for Rizzo's plea to conspiring to violate 18 U.S.C. § 2314. For when Rizzo admitted that he agreed with Ense and Barg at a meeting in Germany that he would get them stolen Treasury bills, Judge MacMahon could certainly consider that the Indictment spoke clearly in terms of United States Treasury Bills stolen from American concerns in New York and Florida and their distribution in Europe and elsewhere by Rizzo and others with the aid of Alfred Barg and Winfried Ense. Further Rizzo specifically acknowledged to Judge MacMahon that he understood he was charged in part with conspiracy to transport stolen securities of the value of $5,000.00 and more in interstate and foreign commerce. These admissions more than satisfied the requirements of Rule 11 as set forth in *Irizarry* v. *United States*, *supra*, 508 F.2d at 967-68, and *Seiller* v. *United States*, 544 F.2d at 563-67.

As to Count Eight, a sufficient factual basis is shown on the record both by Rizzo's own statements as well as his adoption of the statement of the facts provided by the prosecutor. Taken together, they establish that Rizzo travelled to Germany and used the telephone and mails in foreign commerce to obtain money. Although Rizzo at first denied that he used threats of any kind, the prosecutor informed the Court that the government could prove that Rizzo threatened Ense and Barg with physical harm unless they paid him his money (Tr. 14). Further, the Government advised the Court that it also had a tape recording of a telephone call from Rizzo to co-defendant William Benjamin instructing him to convey implied threats to Ense and Barg. Rizzo acknowledged that what the prosecutor said was true; he further specifically admitted that he made the telephone call in Germany which was referred to by the prosecutor. (Tr. 14-15). In their

totality, Rizzo's admissions were more than sufficient to find a factual basis for his plea to violating 18 U.S.C. ¶ 1952 in Count Eight.

Finally, Judge MacMahon could also properly consider in his determination that there was a sufficient factual basis for both pleas the facts that Rizzo's experienced attorney had perused the Government's case file, had fully discussed the case with both Rizzo and the prosecutor and was convinced that there was sufficient proof to warrant a jury returning a jury verdict and that Rizzo had no defense to the charge. (Tr. 20-21).

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Barbara S. Jones being duly sworn deposes and says that She is employed in the office of the United States Attorney for the Southern District of New York.

That on the 27th day of April, 1977 She served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Vincent Rizzo #77336
P.O. Box 4000
Springfield, Missouri 65802

And deponent further says that She sealed the said envelope and placed the same in the mail box for mailing at the United States Courthouse Annex, 1 St. Andrew's Plaza, Borough of Manhattan, City of New York.

Barbara S. Jones

Sworn to before me this
27th day of April 1977
Jacob Laufer

JACOB LAUFER
Notary Public, State of New York
No. 24-4609171
Qualified in Kings County
Commission Expires March 30, 1979